

MEMORANDUM

To: Civil Justice Task Force Members
From: Amy Anderson, Civil Justice Task Force Director
Date: October 30, 2012
Re: 35 DAY MAILING – State and Nation Policy Summit: Civil Justice Task Force

The American Legislative Exchange Council will host its State and Nation Policy Summit from **December 4 to December 6** at the **Grand Hyatt** in **Washington, DC**. If you have not registered for the conference, you may do so [here](#).

About This 35-Day Mailing

This is an electronic-only 35-Day Mailing. In addition to receiving the 35-Day Mailing via e-mail, you may also access it on the Civil Justice Task Force's web page at <http://www.alec.org>. Conversely, if you choose to receive 35-Day Mailings "snail-mailed" to you, please let me know. We will assume that you prefer the 35-Day Mailing e-mailed to you unless you indicate otherwise.

Meetings Civil Justice Task Force Members Should Attend:

- Civil Justice Task Force Meeting, **2:30 PM – 5:30 PM, Friday, December 6**
- Workers' Compensation Subcommittee Meeting, **10:00 AM – 11:00 AM, Wednesday, December 4**

Please find the following materials enclosed:

- SNPS Tentative Agenda and Registration Materials
- Working Agenda for the Civil Justice Task Force Meeting
- Working Agenda for the Workers' Compensation Subcommittee Meeting
- ALEC Mission Statement & Task Force Operating Procedures
- Model Legislation Drafts and Accompanying Discussion Pieces:
 - Model Act on Private Enforcement of Consumer Protection Statutes
 - Noneconomic Damage Awards Act
 - Punitive Damages Standards Act
 - The Citizen Participation Act

The attached is not official ALEC model policy until it passes both the Civil Justice Task Force and ALEC's National Board of Directors.

Travel and Accommodations: The conference hotel for SNPS is the **Grand Hyatt** located at 1000 H. Street, NW, Washington, DC 20001

For State Legislators: Civil Justice Task Force public sector members should contact their State Chairs to inquire about travel reimbursement possibilities to attend the conference.

I look forward to seeing you in Washington. If you have any questions or comments regarding the meeting, please contact me at (202) 742-8510 or by e-mail at aanderson@alec.org.

Date & Time	Program
Tuesday, December 3	
9:00am - 5:00pm	Joint Board of Directors Meeting
1:00pm - 6:00pm	Registration
2:00pm - 6:00pm	Exhibitor Set Up
6:00pm - 9:00pm	Board of Directors Receptions and Dinner

Date & Time	Program
Thursday, December 5	
7:00am - 7:00pm	Registration
8:00am - 9:15am	Plenary Breakfast (Speakers TBA)
9:30am - 5:00pm	ALEC Exhibition Hall Open
9:30am - 10:45am	Workshops (Topics TBA)
11:00am - 12:15pm	Workshops (Topics TBA)
12:30pm - 2:15pm	Plenary Lunch (Speakers TBA)
2:30pm - 5:30pm	Justice Performance Project
2:30pm - 5:30pm	Health and Human Services Task Force Meeting
2:30pm - 5:30pm	Tax and Fiscal Policy Task Force Meeting
2:30pm - 5:30pm	International Relations Task Force Meeting
6:00pm - 7:00pm	Reception

Date & Time	Program
Wednesday, December 4	
7:00am - 6:00pm	Registration
7:00am - 9:00am	Exhibitor Set Up
7:30am - 11:30am	Subcommittee Meetings (Check with Task Force Director)
9:00 - 5:00pm	ALEC Exhibition Hall Open
9:00am - 11:00am	State Chairs Meeting
11:30am - 1:15pm	Opening Luncheon (Speaker TBA)
1:30pm - 2:45pm	Workshops (Topics TBA)
3:00pm - 4:15pm	Workshops (Topics TBA)
5:30pm - 6:30pm	Jefferson Reception

Date & Time	Program
Friday, December 6	
7:30am - 3:00pm	Registration
8:00am - 9:15am	Plenary Breakfast (Speakers TBA)
9:30am - 2:00pm	ALEC Exhibition Hall Open
9:30am - 10:45am	Workshops (Topics TBA)
11:00am - 12:15pm	Workshops (Topics TBA)
12:30pm - 2:15pm	Plenary Lunch (Speakers TBA)
2:30pm - 5:30pm	Civil Justice Task Force Meeting
2:30pm - 5:30pm	Commerce, Insurance and Economic Development Task Force Meeting
2:30pm - 5:30pm	Communications and Technology Task Force Meeting
2:30pm - 5:30pm	Education Task Force Meeting
2:30pm - 5:30pm	Energy, Environment, and Agriculture Task Force Meeting
2:00pm - 5:00pm	Exhibitor Load Out
6:00pm - 7:00pm	Reception
7:00pm-11:00pm	State Night (Contact Your State Chair)

2013 ALEC STATES & NATION POLICY SUMMIT

December 4 – 6, 2013

Grand Hyatt Washington

1000 H Street, NW • Washington, D.C. 20001



ATTENDEE REGISTRATION / HOUSING FORM

Early registration deadline: November 6, 2013

Housing cut-off date: November 6, 2013

Online www.alec.org Email meetings@alec.org Fax 703.373.0932 Phone / Questions 571.482.5056 (Mon-Fri, 9am-5pm EST)

ATTENDEE INFORMATION

Prefix _____ First Name _____ Middle Initial _____ Last Name _____ Suffix(s) : _____
Badge Nickname: _____ Title _____
Organization (required) _____
Preferred Mailing Address: ☐ Business ☐ Home _____
City _____ State/Province _____ Country _____ ZIP/Postal code _____
Preferred Phone ☐ Work ☐ Home ☐ Mobile _____ Alternate phone ☐ Work ☐ Home ☐ Mobile _____ Fax _____
Email (confirmation will be sent by email) _____
On-site Emergency Information Name of Person to Contact: _____ Phone _____ Relationship to You: _____
Do you have any special physical, dietary (for example, vegetarian, kosher), or other needs: ☐ Yes ☐ No
If yes, please describe: _____
☐ This is my first time attending an ALEC event.
***Spouse / Guest:** If registering a spouse or guest, please complete the spouse/guest registration form. Spouse / guest registration is meant to accommodate legal spouses and immediate family members. Attendees from the same organization must register independently.

REGISTRATION INFORMATION

**** Please note that member fees are subject to verification**

	EARLY until Nov6	ON-SITE begin Nov 6	DAILY
<input type="checkbox"/> ALEC Legislative Member	\$375	\$475	\$300
<input type="checkbox"/> Legislator / Non-Member	\$475	\$575	\$400
<input type="checkbox"/> ALEC Private Sector Member	\$650	\$750	\$445
<input type="checkbox"/> Private Sector / Non-Member	\$925	\$1100	\$545
<input type="checkbox"/> ALEC Non-Profit Member (501(c)(3) status required)	\$525	\$625	\$400
<input type="checkbox"/> Non-Profit Non-Member (501(c)(3) status required)	\$675	\$825	\$500
<input type="checkbox"/> Legislative Staff / Government	\$375	\$475	\$300
<input type="checkbox"/> ALEC Alumni	\$425	\$525	\$300
<input type="checkbox"/> ALEC Legacy Member	\$0	\$0	\$0

For Daily Registration, select which day: ☐ Wed ☐ Thur ☐ Fri

REGISTRATION FEES: \$ _____

Note: Registration forms with enclosed payments must be received by November 6, 2013 to be eligible for early bird registration rates. Forms and/or payments received after November 6, 2013 will be subject to the on-site registration rate.

REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed, faxed, or mailed within 72 hours of receipt of payment.

REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm EST November 6, 2013 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm EST November 6, 2013.

HOUSING

RESERVATION CUTOFF FOR ALEC DISCOUNTED RATE IS November 6, 2013

Grand Hyatt Washington Arrival Date _____ Departure Date _____
Sharing with: (Maximum 4 guests per room) _____
Room Type Special requests
☐ Single (1 person – 1 bed) \$289 ☐ ADA room required:
☐ Double (2 persons – 1 bed) \$289 ☐ Audio ☐ Visual ☐ Mobile
☐ Double/ Double (2 persons – 2 beds) \$289 ☐ Rollaway / crib: _____
☐ Triple (3 persons – 2 beds) \$314 ☐ Other: _____
☐ Quad (4 persons – 2 beds) \$314

All rates DO NOT include state and local tax currently 14.5% (subject to change)

Note: Cutoff for reservations at the ALEC rate is November 6, 2013. After November 6, 2013, every effort will be made to accommodate new reservations, based on availability and rate. Room types and special requests are not guaranteed. The hotel will assign specific room types at check in, based upon availability.

HOUSING CONFIRMATION INFORMATION

Online reservations will receive immediate email confirmation. Reservations received by form will be confirmed via email, fax, or mail within 72 hours of receipt.

Credit Card Information/ Reservation Guarantee

Credit Card information is required at time of reservation to guarantee the reservation. Card must be valid through December 2013

☐ Please use the same credit card information as above.
☐ Amer Express ☐ Visa ☐ MasterCard ☐ Discover
Card # _____
Cardholder (please print) _____
Exp Date (mm/yy) _____ Security Code _____
Signature _____

HOUSING CANCELLATION / REFUND INFORMATION

Credit cards will be charged one night room and tax in the event of a no show or if cancellation occurs within 72 hours prior to arrival. Early departure fee is one night's room and tax. Please obtain a cancellation number when your reservation is cancelled.

2013 ALEC STATES & NATION POLICY SUMMIT

December 4 – 6, 2013

Grand Hyatt Washington

1000 H Street, NW • Washington, D.C. 20001



SPOUSE/GUEST REGISTRATION FORM

■ **Online**
www.alec.org

☎ **Fax (credit cards only)**
703.373.0932

📞 **Phone / Questions** • Mon-Fri, 9am-5:00 pm EST
571.482.5056

ATTENDEE INFORMATION IS REQUIRED TO REGISTER A SPOUSE OR GUEST

First Name _____ Last Name _____

Organization _____

Daytime phone _____

Email (*Confirmation will be sent by email*) _____

SPOUSE / GUEST REGISTRATION

SPOUSE / GUEST REGISTRATION GUIDELINES

1. Spouse / guest registration is meant to accommodate legal spouse and immediate family members.
2. Attendees from the same organization must register independently. No exception will be made.
3. Spouse / guest designation will be clearly visible on name badge.

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

Prefix _____ Last Name _____ First Name _____ Middle initial _____ Badge Nickname _____

SPOUSE / GUEST REGISTRATION FEES	Number of Spouse/Guest(s)	Fee	TOTAL
<input type="checkbox"/> Spouse / Guest <i>please note name(s) above</i>	_____	\$ 150	\$ _____

METHOD OF SPOUSE / GUEST REGISTRATION PAYMENT

Credit Card: Credit cards will be charged immediately. Please fax to the above number for processing.

☐ Amer Express Card # _____
☐ Visa Cardholder (*please print*) _____
☐ MasterCard Exp Date (*mm/yy*) ____/____ Signature _____

REGISTRATION CONFIRMATION INFORMATION

Online registrants will receive immediate email confirmation. If registering by form, confirmation will be emailed within 72 hours of receipt of payment.

REGISTRATION CANCELLATION / REFUND INFORMATION

Registrations cancelled prior to 5pm EST November 6, 2013 are subject to a \$100 cancellation fee. Registrations are non-refundable after 5pm EST November 6, 2013.

Civil Justice Task Force Meeting

States and Nation Policy Summit | The Grand Hyatt | Washington, DC
December 6, 2013 | 2:30 p.m.-5:30 p.m.

2:30 p.m.	Welcome and Introductions
2:45 p.m.	Task Force Update and Sunset Review Overview
2:55 p.m.	State Legal Reform Activity Update
3:05 p.m.	PRESENTATION: Insights and Experiences from the Phantom Damages Elimination Act
3:20 p.m.	Model Legislation: Update to the Non-Economic Damages Act
3:30 p.m.	PRESENTATION: Reforming Archaic Discovery Rules on the Federal Level
3:45 p.m.	Model Legislation: The Citizen Participation Act
4:05 p.m.	PRESENTATION: Patent Trolling Litigation: What Can the States Do?
4:20 p.m.	PRESENTATION: Asbestos Bankruptcy Trust Reform: Fighting Fraud and Preserving Resources
4:35 p.m.	Model Legislation: Punitive Damages Standards Act
4:55 p.m.	Model Legislation: Update to the Private Enforcement of Consumer Protection Statutes Act
5:10 p.m.	Roundtable Open Discussion: New Issues in Lawsuit Reform Around the Country
5:25 p.m.	For the Good of the Order
5:30 p.m.	Adjournment



Workers' Compensation Subcommittee

States and Nation Policy Summit | The Grand Hyatt | Washington, DC
December 4, 2013 | 10:00 a.m.-11:00 a.m.

10:00 a.m. Welcome and Introductions

10:30 a.m. Discussion: Developing Guidelines for Workers' Compensation Reform

11:00 a.m. Adjourn



Mission Statement

To advance free markets, limited government,
and federalism.



LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

The Citizen Participation Act

Model Legislation

Section 1. {Definitions}

In this chapter:

- (1) "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.
- (2) "Exercise of the right of association" means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.
- (3) "Exercise of the right of free speech" means a communication made in connection with a matter of public concern.
- (4) "Exercise of the right to petition" means any of the following:
 - (A) a communication in or pertaining to:
 - (i) a judicial proceeding;
 - (ii) an official proceeding, other than a judicial proceeding, to administer the law;
 - (iii) an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government;
 - (iv) a legislative proceeding, including a proceeding of a legislative committee;
 - (v) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity;
 - (vi) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue;
 - (vii) a proceeding of the governing body of any political subdivision of this state;
 - (viii) a report of or debate and statements made in a proceeding described by Subparagraph (iii), (iv), (v), (vi), or (vii); or
 - (ix) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting;

(B) a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(C) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding;

(D) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding; and

(E) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the constitution of this state.

(5) "Governmental proceeding" means a proceeding, other than a judicial proceeding, by an officer, official, or body of this state or a political subdivision of this state, including a board or commission, or by an officer, official, or body of the federal government.

(6) "Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.

(7) "Matter of public concern" includes an issue related to:

(A) health or safety;

(B) environmental, economic, or community well-being;

(C) the government;

(D) a public official or public figure; or

(E) a good, product, or service in the marketplace.

(8) "Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

(9) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

(A) an officer, employee, or agent of government;

(B) a juror;

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

(D) an attorney or notary public when participating in the performance of a governmental function; or

(E) a person who is performing a governmental function under a claim of right but is not legally qualified to do so.

Section 2. {Purpose}

The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

Section 3. {Motion to Dismiss}

(a) If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action.

(b) A motion to dismiss a legal action under this section must be filed not later than the 60th day after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause.

(c) Except as provided by Section 6(b), on the filing of a motion under this section, all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.

Section 4. {Hearing}

(a) A hearing on a motion under Section 3 must be set not later than the 60th day after the date of service of the motion unless the docket conditions of the court require a later hearing, upon a showing of good cause, or by agreement of the parties, but in no event shall the hearing occur more than 90 days after service of the motion under Section 3, except as provided by Subsection (c).

(b) In the event that the court cannot hold a hearing in the time required by Subsection (a), the court may take judicial notice that the court's docket conditions required a hearing at a later date, but in no event shall the hearing occur more than 90 days after service of the motion under Section 3, except as provided by Subsection (c).

(c) If the court allows discovery under Section 6(b), the court may extend the hearing date to allow discovery under that subsection, but in no event shall the hearing occur more than 120 days after the service of the motion under Section 3.

130
131 **Section 5. {Ruling}**
132

133 (a) The court must rule on a motion under Section 3 not later than the 30th day following the
134 date of the hearing on the motion.
135

136 (b) Except as provided by Subsection (c), on the motion of a party under Section 3, a court shall
137 dismiss a legal action against the moving party if the moving party shows by a preponderance of
138 the evidence that the legal action is based on, relates to, or is in response to the party's exercise
139 of:

140 (1) the right of free speech;

141
142 (2) the right to petition; or

143
144 (3) the right of association.
145

146 (c) The court may not dismiss a legal action under this section if the party bringing the legal
147 action establishes by clear and specific evidence a prima facie case for each essential element of
148 the claim in question.
149

150 (d) Notwithstanding the provisions of Subsection (c), the court shall dismiss a legal action
151 against the moving party if the moving party establishes by a preponderance of the evidence each
152 essential element of a valid defense to the nonmovant's claim.
153

154 **Section 6. {Evidence}**
155

156 (a) In determining whether a legal action should be dismissed under this chapter, the court shall
157 consider the pleadings and supporting and opposing affidavits stating the facts on which the
158 liability or defense is based.
159

160 (b) On a motion by a party or on the court's own motion and on a showing of good cause, the
161 court may allow specified and limited discovery relevant to the motion.
162

163 **Section 7. {Additional Findings}**
164

165 (a) At the request of a party making a motion under Section 3, the court shall issue findings
166 regarding whether the legal action was brought to deter or prevent the moving party from
167 exercising constitutional rights and is brought for an improper purpose, including to harass or to
168 cause unnecessary delay or to increase the cost of litigation.
169

170 (b) The court must issue findings under Subsection (a) not later than the 30th day after the date a
171 request under that subsection is made.
172

173 **Section 8. {Appeal}**
174

(a) If a court does not rule on a motion to dismiss under Section 3 in the time prescribed by Section 5, the motion is considered to have been denied by operation of law and, in this circumstance, and when the motion is denied by the court, the moving party may appeal.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 3 or from a trial court's failure to rule on that motion in the time prescribed by Section 5.

(c) – An interlocutory appeal under Subsection (a), stays the commencement of a trial and all other proceedings in the trial court pending resolution of the appeal.

Section 9. {Damages and Costs}

(a) If the court orders dismissal of a legal action under this chapter, the court shall award to the moving party:

(1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and

(2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

(b) If the court finds that a motion to dismiss filed under this chapter is frivolous or solely intended to delay, the court may award court costs and reasonable attorney's fees to the responding party.

Section 10. {Exemptions}

(a) This chapter does not apply to an enforcement action that is brought in the name of this state or a political subdivision of this state by the attorney general, a district attorney, a criminal district attorney, or a county attorney.

(b) This chapter does not apply to a legal action brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

(c) This chapter does not apply to a legal action seeking recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.

(d) This chapter does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Section 11. {Construction}

(a) This chapter does not abrogate or lessen any other defense, remedy, immunity, or privilege available under other constitutional, statutory, case, or common law or rule provisions.

(b) This chapter shall be construed liberally to effectuate its purpose and intent fully.

Section 12. {Severability Clause}

Section 13. {Repealer Clause}

Section 14. {Effective Date}

This Act shall be effective as to any civil suit for damages commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Summary of the Citizen Participation Act

During the 2011 Session of the Texas legislature, Texas joined 28 other states and the District of Columbia in adopting an Anti-SLAPP¹ statute aimed at providing a mechanism for early dismissal of meritless lawsuits brought against those who exercise their free speech rights. This model bill is based on the law passed in Texas.

The 2011 Texas Anti-SLAPP statute, and its subsequent 2013 amendment, is one of the strongest in the nation. The statute allows a judge to dismiss meritless lawsuits (including claims and counterclaims) filed against one who speaks out about a “matter of public concern” (which is defined expansively) within the first 60-90 days after the case was filed.² Once an Anti-SLAPP motion is filed, discovery is stayed unless there is a showing of good cause and the judge orders discovery, but it is still limited to what is necessary to address the motion.

In order to obtain a dismissal under the proposed model bill, one must establish, by a preponderance of the evidence, that the lawsuit was filed in response to the exercise of one’s First Amendment rights. Then, the burden shifts to the plaintiff to establish, by clear and specific evidence, that they have support for each essential element of their claim. In addition, the court can dismiss the case, if the moving party establishes a valid defense to the claim.

If the Anti-SLAPP motion is denied, one can file an immediate interlocutory appeal which is to be handled on an expedited basis and during which the entire underlying proceeding is stayed.

Finally, there is a mandatory fee shifting provision if an Anti-SLAPP motion is granted so the person or entity wrongfully filing a lawsuit must pay the defense costs. There is also a discretionary fee award if the court finds the Anti-SLAPP motion was frivolous or brought solely for the purpose of delay.

¹ The acronym “SLAPP” stands for “Strategic Lawsuit Against Public Participation” and is a lawsuit aimed at those people who are speaking out about matters of public concern, petitioning their government for redress of grievances or exercising their First Amendment right of association.

² There are a few exemptions: for enforcement actions brought by the State or law enforcement, for commercial speech, the sale of insurance products or services and for wrongful death and bodily injury lawsuits. The statute also does not apply to a legal action brought under the Insurance Code or arising out of an insurance contract.

Punitive Damages Standards Act

Summary

The Punitive Damages Standards Act establishes a standard for liability for punitive damages, raises the burden of proof to clear and convincing evidence, allows a bifurcated trial on the question of whether the defendant is liable for punitive damages, limits the amount of a punitive damages award to twice the amount of the plaintiff's actual compensatory damages, limits vicarious liability for punitive damages, and precludes imposition of punitive damages when a product or service is was approved by a government agency or in complies with government regulations. Because the laws governing punitive damages vary so much among the states, a legislator planning to introduce a punitive damages bill should first obtain information about his or her state's laws governing punitive damages.

Model Legislation

Section 1. {Title}

This Act shall be known and may be cited as the Punitive Damages Standards Act.

Section 2. {Legislative Finding}

~~The legislature finds and declares that:~~

~~(A) The specter of unlimited punitive damages encourages plaintiffs and defendants to try cases needlessly and frustrates early settlement, thereby delaying justice and impeding the swift award of compensatory damages to victims;~~

~~(B) Reasonable and fair standards will promote predictability in the award of punitive damages in a manner fully consistent with the objective of deterrence;~~

~~(C) Private enterprise has been hampered unduly by the threat of unreasonable punitive damages awards, with the consumer paying the ultimate costs in higher prices and insurance costs;~~

~~(D) Punitive damages are private punishments in the nature of fines awarded in civil cases;~~

~~(E) When warranted in egregious cases, punitive damages can provide an appropriate expression of public disapproval for conduct that is truly shocking;~~

~~(F) Current procedures for the award of punitive damages do not properly protect those accused of serious wrongdoing nor provide sufficient guidance for the imposition of these penalties; and~~

~~(G) It is in the public interest to strike a balance between deterring egregious misconduct and encouraging reasonable activity.~~

Section 23. {Definitions}

For the purposes of this Act, the meaning of the terms specified shall be as follows:

(A) “Clear and convincing evidence” means evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence, but less than beyond a reasonable doubt.

(B) “Compensatory damages” means damages intended to make good the loss of an injured party and no more. The term includes general and special damages and does not include nominal, exemplary or punitive damages.

~~(C) “Defendant” means any party against whom punitive damages are sought.~~

~~(DC)~~ “Malice” means either conduct which is specifically intended by the defendant to cause tangible or intangible serious injury to the plaintiff or conduct that is carried out by the defendant both with a flagrant indifference to the rights of the plaintiff and with a subjective awareness that such conduct will result in tangible serious injury.

~~(ED)~~ “Nominal damages” are damages that are not designed to compensate a plaintiff and are less than \$500.

~~(F) “Plaintiff” means any plaintiff claiming punitive damages.~~

~~(GE)~~ “Product” means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part or parts, and produced for introduction into trade or commerce.

~~(HF)~~ “Punitive damages” includes exemplary or vindictive damages and means damages awarded against a party in a civil action because of aggravating circumstances in order to penalize and to provide additional deterrence against a defendant to discourage similar conduct in the future. Punitive damages do not include compensatory damages or nominal damages.

~~(IG)~~ “Service” means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from manufacture or sale of a product and that are regulated, approved, or licensed by a government agency. Services include, but are not limited to financial services and the provision of insurance.

Section 43. {Pleading Punitive Damages; ~~Pre-Suit Notice~~}

(A) An award of punitive damages must be specifically prayed for in the complaint.

~~(B) The plaintiff must specifically plead either:~~

~~(1) That at least 30 days in advance of filing the complaint, that the plaintiff has given notice of seeking damages pursuant to this Act and that in good faith a reasonable settlement could not be reached; or~~

~~(2) That such 30 days notice under this section could not be given because of exigent circumstances.~~

~~(CB)~~ The plaintiff shall not specifically plead an amount of punitive damages, only that such damages are sought in the action.

~~(DC)~~ The prayer for punitive damages shall be stricken prior to trial by the court, unless the plaintiff presents prima facie evidence sufficient to sustain an award of punitive damages under this Act to the court at least 30 days prior to trial.

Section 54. {Procedure for Award of Punitive Damages}

(A) All actions tried before a jury involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial before the same jury.

(B) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.

(C) Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.

(D) In the second stage of a bifurcated trial, the jury shall determine if a defendant is liable for punitive damages.

(E) Evidence of a defendant's financial condition or net worth is not admissible in the proceedings on punitive damages.

(F) In determining the amount of punitive damages, the trier of fact shall consider to the extent relevant, all relevant evidence, including the following:

(1) The level nature and of reprehensibility of the defendant's conduct wrongdoing;

(2) The severity of the harm suffered by the plaintiff as a result of the caused by the defendant's conduct, including whether the harm was physical rather than economic in nature;

(23) The extent to which the plaintiff's own conduct contributed to the harm;

(34) The duration of the conduct, the defendant's awareness, and any concealment by the defendant;

(45) The profitability of the conduct to the defendant;

~~(5) Awards of compensatory and punitive damages to persons similarly situated to the plaintiff;~~

~~(6) Prospective awards of compensatory damages to persons similarly situated to the plaintiff;~~

(76) Any criminal penalties imposed on the defendant as a result of the conduct complained of by the plaintiff; and

(87) The amount of any civil fines assessed against the defendant as a result of the conduct complained of by the plaintiff.

~~(G) In determining the amount of punitive damages, the trier of fact shall not consider the wealth or financial condition of the defendant, but such evidence may be considered by the trial and appellate courts in determining whether the award is excessive.~~

(HG) If a verdict is rendered awarding punitive damages, the trial court shall carefully review the decision of the trier of fact, considering all relevant evidence, including the factors identified in paragraph 5F above, to ensure that the award does not exceed an amount necessary for the sake of example and to punish the defendant. Trial courts are to reflect in the record their reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of damages.

(HI) The amount of punitive damages shall be reduced pursuant to the contributory or comparative fault principles of the law of this state. In any action in which there are two or more defendants, an award of punitive damages must be specific as to each defendant, and each defendant is liable only for the amount of the award made against that defendant.

Section 65. {Proof Required for Award of Punitive Damages}

Punitive damages may only be awarded if the plaintiff proves by clear and convincing evidence that his or her harm was the result of actual malice. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.

Section 76. {Ceiling for Punitive Damages Award}

(A) No award of punitive damages shall exceed two times the amount of the plaintiff's actual ~~plaintiff's~~ compensatory damages ~~award~~ or ~~\$250,000~~ [SET \$ AMOUNT], whichever is greater. If the defendant is an individual or a business with 50 or fewer full-time employees, no award of

punitive damages shall exceed two times the amount of the plaintiff's actual compensatory damages or ~~\$250,000~~[SET \$ AMOUNT], whichever is less.

(B) Awards of judgment interest, attorneys' fees, and civil penalties shall not constitute actual compensatory damages for purposes of determining a punitive damages ratio under this subsection.

Section 7. {Vicarious Liability}

(A) The culpability of a defendant for punitive damages whose liability is alleged to be vicarious shall be determined separately from that of any alleged agent, employee, or representative.

(B) Notwithstanding paragraph (A) of this subsection, punitive damages may be awarded against a defendant based on vicarious liability for the acts or omissions of an agent or employee only if the finder of fact determines by special verdict based on clear and convincing evidence that one or more of the following has occurred:

(1) The act or omission was committed by a person employed in a management capacity while that person was acting within the scope of employment;

(2) The defendant was reckless in hiring, supervising, or training the agent or employee and that recklessness was the proximate cause of the act or omission that caused the loss or injury; or

(3) The defendant authorized, ratified, or approved the act or omission with knowledge or conscious or reckless disregard that the act or omission may result in the loss or injury.

(C) Nothing in this subsection shall be construed to expand or increase the scope of vicarious liability for punitive damages under state law.

(D) For purposes of this subsection, "a person employed in a management capacity" means an employee with authority to set policy and exercise control, discretion, and independent judgment over a significant scope of the employer's business.

Section 8. {Availability of Punitive Damages}

~~Nothing contained in this Act is to be construed as to creating any claim for punitive damages which is not now present under the law of this state.~~

Section 9. {FDA Defense Regulatory Compliance}

(A) A defendant shall not be liable for punitive damages if:

(1) The product alleged to have caused the harm was designed, manufactured, packaged, labeled, sold, or represented in relevant and material respects in accordance with the terms of an approval, license or similar determination of a government agency; or

(2) The product was in compliance with a statute of this State or the United States, or a standard, rule, regulation, order, or other action of a government agency pursuant to statutory authority, where such statute or agency action is relevant to the event or risk allegedly causing the harm and the product was in compliance at the time the product left the control of the manufacturer or seller.

(3) The act or transaction forming the basis of the claim involves terms of service, contract provisions, representations, or other practices authorized by, or in compliance with, the rules, regulations, standards, or orders of, or a statute administered by, a government agency.

(B) This section shall not apply if the claimant establishes that the defendant at any time before the event that allegedly caused the harm did any of the following:

(1) Sold the product or service after the effective date of an order of a government agency to remove the product from the market, to withdraw its approval of the product or service, or to substantially alter its terms of approval of the product or service in a manner that would have avoided in the claimant's alleged injury; or

(2) Intentionally, and in violation of applicable regulations, withheld from or misrepresented to the government agency information material to the approval or maintaining of approval of the product or service, and such information is relevant to the harm which the claimant allegedly suffered; or

(3) Made an illegal payment to an official or employee of a government agency for the purpose of securing or maintaining approval of the product or service.

~~(A) Punitive damages shall not be awarded if a drug or device or combination device or food or food additive which caused the claimant's harm:~~

~~(1) Was subject to premarket approval or licensure by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat.1040, 21 U.S.C.Sec.301 et seq. or the "Public Health Service Act," 58 Stat.682, 42 U.S.C.Sec.201 et seq. and was approved or licensed; or~~

~~(2) Is generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations, including packaging and labeling regulations.~~

~~(B) This exception shall not apply where the plaintiff proves by clear and convincing evidence that the product manufacturer:~~

~~(1) Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or~~

~~(2) Made an illegal payment to an official of the federal Food and Drug Administration for the purpose of securing approval of the product.~~

Section 9. {Availability of Punitive Damages}

Nothing contained in this Act is to be construed as to creating any claim for punitive damages which is not now present under the law of this state.

Section 10. {Severability Clause}

Section 11. {Repealer Clause}

Section 12. {Effective Date}

This Act shall be effective as to any civil suit for damages commenced on or after the date of enactment of the Act regardless of whether the claim arose prior to the date of enactment.

Originally Approved by the ALEC Board of Directors in 1995.

EXPLANATION OF PROPOSED AMENDMENTS TO THE ALEC MODEL PUNITIVE DAMAGES STANDARDS ACT

Purposes

The proposed amendments to the ALEC Punitive Damage Standards Act are intended to (1) streamline the act by removing nonessential or unused provisions; (2) update its provisions to reflect developments in constitutional law governing punitive damages since the model act's adoption in 1995; (3) clarify that the dollar amount of any limit on punitive damages is a public policy determination for individual state legislatures; (4) eliminate consideration of extra-compensatory damages, such as attorneys' fees and prejudgment interest, that improperly inflate "compensatory damages" with respect to calculating the statutory limit on punitive damages; (5) limit vicarious liability for punitive damages, and (6) replace the existing model act's "FDA defense" with a regulatory compliance provision that is consistent with ALEC's more recently adopted model Regulatory Compliance Congruity with Liability Act.

Section 2. {Legislative Findings}

The proposed amendment would eliminate legislative findings. Legislators may develop findings specific to the public policy of their states.

Section 3. {Definitions}

The proposed amendment eliminates definitions for commonly understood terms (i.e., "plaintiff" and "defendant").

Section 3 {Pleading Punitive Damages; Pre-Suit Notice}

The 1995 version of the model act required a plaintiff to give 30 days pre-suit notice to the defendant of the intent to seek punitive damages, and to state in the complaint that a reasonable settlement could not be reached. The proposed amendment eliminates the pre-suit notice requirement. It does not appear that any state has enacted such a provision.

Section 4. {Procedure for Award of Punitive Damages}

The proposed amendments revise the factors that a fact finder may consider in setting the amount of a punitive damages award. The revised factors reflect constitutional law developments since the model act's 1995 adoption. A proposed amendment adds "the nature and reprehensibility of the defendant's wrongdoing" as the first factor to reflect the Supreme Court's finding that the reprehensibility of the defendant's conduct is considered the "most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). A proposed amendment strikes two factors, (5) and (6), which required juries to consider prior awards of compensatory and punitive damages to other people and potential future awards of compensatory damages to persons similarly situated, in determining the amount of a punitive damage award. These factors are inconsistent with Supreme Court precedent. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003), the Court instructed that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." Similarly, the Court has found that trial courts must adequately instruct the jury that it cannot punish the defendant for harm done to others. See *Philip Morris USA v. Williams*, 549 U.S. 346, 356-57 (2007).

A proposed amendment also strikes paragraph (G), which prohibits a jury from hearing evidence of the defendant's wealth, but allows courts to consider such wealth when determining whether a punitive damage award is excessive. Defendants may have divergent views about the introduction of evidence of their financial condition. For example, for larger businesses, wealth evidence may inflate punitive damage awards, while smaller businesses and those in precarious financial condition may wish to educate the jury on the impact that a punitive damage award will have on their continued viability. The use of wealth evidence is addressed in recent Supreme Court opinions. See, e.g., *Campbell*, 538 U.S. at 427 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

Section 6. {Ceiling on Punitive Damage Award}

The 1995 model act recommends that punitive damages should be limited to twice the plaintiffs' compensatory damages or \$250,000, whichever is *greater*. With respect to small businesses, the model act recommends a limit of two times the plaintiffs' compensatory damages or \$250,000, whichever is *less*. The purpose of this provision is to provide proportionality between the actual harm caused by the defendant's misconduct and the punitive damages award, providing fairer notice to a defendant of the potential penalty.

The proposed amendment makes two changes to this section. First, the proposal would remove the \$250,000 amount and does not recommend any particular level for a punitive damage limit. About half of the states have enacted a statutory limit on punitive damages. The amount of the cap varies significantly from state to state. For that reason, the proposed amendment provides no specific recommendation on the amount of the limit, which should be determined based on the public policy preferences of each state.

Second, a proposed amendment would clarify that extra-compensatory awards of judgment interest, attorneys' fees, and civil penalties do not constitute actual compensatory damages for purposes of applying the multiplier to calculate the maximum permissible punitive damage award. Many states have adopted limits on punitive damages that include a multiple of the plaintiff's compensatory damages, as recommended by the model act (typically the greater of one, two, or three times the compensatory award or a maximum dollar amount set by statute).¹ Most state laws, as well as ALEC model act, do not provide clear guidance to courts as to whether a plaintiff's attorneys' fees or judgment interest, when awarded,² should be considered "compensatory" for purposes of applying the cap. Courts have reached inconsistent conclusions as to whether such amounts are "compensatory."³ This is an important issue because adding attorneys' fees or judgment interest to the amount awarded for actual harm may result in exponentially larger punitive damage awards that are not tied to the defendant's conduct.

Judgment interest, attorneys' fees, and civil penalties should not be considered "compensatory" damages.

- Attorneys' fees are not ordinarily recoverable in civil litigation. In some types of cases, legislatures have authorized recovery of litigation expenses for public policy reasons, not to serve compensatory goals. Including attorneys' fees in the amount of compensatory damages will arbitrarily result in higher punitive and treble damage awards in the types of cases in which recovery of legal fees are authorized and lower awards in other cases. As a result, defendants will be punished based on the type of claim the plaintiff asserts, rather than its conduct.
- The amount of judgment interest awarded is largely a function of the length and complexity of a lawsuit. Basing a punitive or treble damage award the amount of time that has passed since the injury or filing of a lawsuit punishes an individual or company for defending itself in court. In addition, the high judgment interest rates applicable in some states – which run as high as ten or even twelve percent⁴ – already include a punitive element. As a result, basing a punitive or treble damage award on judgment interest results in duplicative and excessive punishment.
- Neither attorneys' fees nor judgment interest are determined by the jury when it calculates the plaintiff's damages. Both amounts are determined by a court applying state law that has no tie to the defendant's conduct.

New Section. {Vicarious Liability}

This new section of the model act clarifies that a defendant who is vicariously liable for the acts of another is generally not subject to punitive damages. Under the theory of vicarious liability, employers may have to pay for a plaintiff's injuries for medical bills, lost wages, and pain and suffering if such injuries were caused by an the actions of an employee of the company while on the job. In such situations, the employer may not have directed the employee to act wrongfully, but is deemed liable as a matter of law. Punitive damages, however, are intended to punish a party for especially bad acts, not the wrongful conduct of others.

Under the new section, which is based on a recently enacted Tennessee law,⁵ employers who are vicariously liable may have to pay punitive damages only in three instances: (1) if the act was committed by a manager; (2) if the employer

knew about the bad act; or (3) if the employer was reckless in hiring, training, or supervising the employee. Other states have adopted similar provisions.⁶

Section 9. {FDA Defense}

The 1995 model act provides that punitive damages are not available in litigation involving a drug, medical device, or food or food additive that is subject to premarket approval or licensure by the U.S. Food and Drug Administration with certain exceptions. For purposes of consistency in ALEC policy, the proposed amendment replaces the “FDA defense” with a provision of the model Regulatory Compliance Congruity with Liability Act that ALEC adopted in 2007 and revised in January 2013. This provision applies to all products and services that are specifically approved by a government agency or in compliance with government standards relevant to the event or risk of harm that occurred. In such situations, a defendant remains subject to punitive damages if it sold a product or service after a government-ordered recall or withdrawal of approval, intentionally withheld or misrepresented information to the agency to secure or maintain approval of the product or service, or made an illegal payment to a government official to secure or maintain approval of the product or service. Several states have adopted similar provisions.⁷ This provision incorporates the fundamental principle that a business should not be punished when it follows the law.

¹ See, e.g., Ala. Code § 6-11-21; Alaska Stat. § 09.17.020; Colo. Rev. Stat. § 13-21-102; Fla. Stat. Ann. § 768.73; Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Mo. Rev. Stat. § 510.265; Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Code § 1D-25; N.D. Cent. Code § 32-03.2-11(4); Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1; S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Wis. Stat. Ann. § 895.043(6); see also Conn. Gen. Stat. Ann. § 52-240b (limiting punitive damages to “twice the damages awarded” in product liability cases); 40 Pa. Cons. Stat. Ann. § 1303.505 (limiting punitive damages to two times compensatory damages in cases against healthcare providers).

² An estimated 200 federal statutes and close to 2,000 state laws permit or require a losing party to pay a prevailing party’s attorneys’ fees and costs. See David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and the “English Rule,”* 15 Ind. Int’l & Comp. L. Rev. 583, 588 (2005). Determination of judgment interest varies significantly from state to state.

³ Courts have reached inconsistent conclusions as to whether such amounts are “compensatory.” For example, several Texas appellate courts have properly recognized that prejudgment interest is *not* part of actual damage award upon which a punitive damages cap may be calculated. See *Wheelways Ins. Co. v. Hodges*, 872 S.W.2d 776, 783 n.8 (Tex. Ct. App. 1994); see also *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 841 (Tex. Ct. App. 1995) (discussing *Wheelways* finding with approval); *Mobil Oil Corp. v. Ellender*, 934 S.W.2d 439 (Tex. Ct. App. 1996) (agreeing with *Wheelways*), *aff’d in part and rev’d in part on other grounds*, 968 S.W.2d 917 (Tex. 1998). More recently, the Missouri Supreme Court ruled that its statute limiting punitive damages to five times the “net amount of the judgment” includes the attorneys’ fees awarded to a plaintiff in a disability discrimination action. See *Hervey v. Missouri Dept. of Corrections*, 379 S.W.3d 156, 165 (Mo. 2012) (en banc) (sustaining a \$1.3 million punitive damage award by including in the “net amount of the judgment” nearly \$100,000 in attorney’s fees in addition to \$127,056 in actual damages and \$36,288 front pay award). In that instance, by including prejudgment interest, the court was able to affirm a punitive damage award that was about \$500,000 larger under the statutory cap than would otherwise be permissible.

⁴ See, e.g., Cal. Civ. Code §§ 3287 to 3291; Haw. Rev. Stat. § 478-2; Mass. Gen. Laws Ch. 231 §§ 6B, 6C; Minn. Stat. § 549.09(c)(2); Mont. Code Ann. § 25-9-205; N.M. Stat. § 56-8-4; R.I. Gen. Laws § 9-21-10; S.D. Codified Laws § 21-1-13.1; Tenn. Code Ann. §§ 47-14-121 to 123; Wis. Stat. §§ 807.01(4), 814.04(4), 815.05(8).

⁵ S.B. 222 (Tenn. 2013) (codified at Tenn. Code Ann. § 29-39-104(g)(1)).

⁶ See, e.g., Cal. Civ. Code § 3294(b) (“An employer shall not be liable for [punitive damages] based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.”).

⁷ See, e.g., Ariz. Rev. Stat. § 12-689; Tenn. Code Ann. § 29-39-104(e).



LIMITED GOVERNMENT • FREE MARKETS • FEDERALISM

Model Act on Private Enforcement of Consumer Protection Statutes

Summary

State consumer protection statutes, frequently known as “unfair and deceptive trade practices acts,” vary widely from state to state. ALEC’s Model Act on Private Enforcement of Consumer Protection Statutes structures the private right of action under such laws to reflect sound public policy. Legislation based on the model act must be carefully drafted to fit within the state’s existing statutory scheme. Cross-references to the state’s existing definition of an unlawful act or practice, optional language, and language that may be altered to fit the preference of the sponsor or consistency with state law are presented in brackets.

Model Legislation

Section 1. Private Right of Action.

(a) A person who reasonably relies upon an act or practice declared unlawful by [SECTION] in entering into a transaction and thereby suffers an ascertainable loss of money or property may bring an action under this Act to enjoin further violations, or to recover as damages the out-of-pocket loss the person sustained as a result of such act or practice, or both. The “out-of-pocket loss” shall be no more than the difference between what the person paid for the product or service and what the product or service was actually worth in the absence of the unlawful act or practice.

(b) At least ten days prior to the commencement of any action brought under this section, any person intending to bring such an action shall notify the prospective defendant of the intended action, and give the prospective defendant an opportunity to confer with the person, the person’s counsel, or other representative as to the proposed action. Such notice shall be given to the prospective defendant by mail, postage prepaid, to the prospective defendant’s usual place of business, or if the prospective defendant has no usual place of business, to the prospective defendant’s last known address.

IN STATES PROVIDING FOR AND OPTING TO MAINTAIN TREBLE DAMAGES, INCLUDE PARAGRAPHS (c) AND (d):

(c) If the [court OR trier of fact] finds by clear and convincing evidence that the use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public, the court may award up to three (3) times the actual damages sustained[, or \$500 per person, whichever is greater]. “Actual damages” means the out-of-pocket loss the

person sustained as a result of the unlawful act or practice and does not include judgment interest, attorneys' fees, or civil penalties.

(d) In determining whether to award enhanced damages under Subsection (b) and the amount of such penalty, the [court OR trier of fact] shall consider:

- (1) if the amount of the actual damages awarded would have a deterrent effect upon the defendant;
- (2) the seriousness of the violation, including the nature, circumstances, frequency, and gravity of any prohibited act or practice;
- (3) the history of previous violations;
- (4) the good faith of the person found to have violated the Act, including whether the person took prompt and appropriate remedial action upon learning of the alleged violation; and
- (5) any other matter that justice may require.

(e) Any person who is entitled to bring an action under Subsection (a) on his or her own behalf against an alleged violator of this act for damages for an act or practice declared unlawful by [SECTION] may bring a class action against such person on behalf of any class of persons of which he or she is a member and which has been damaged by such act or practice, subject to and pursuant to the [STATE] Rules of Civil Procedure governing class actions. [In any such class action, the court shall not award statutory damages, but recovery shall be limited to actual out-of-pocket loss suffered by the person or persons.]¹ This paragraph is not intended to create or otherwise permit class action relief where not permitted by state law.²

(f) Punitive or exemplary damages are not permitted in an action maintained under this Section.

Section 2. Attorneys Fees and Costs.

The court may award reasonable attorneys' fees and costs to:

(a) A prevailing plaintiff upon a finding [by the court OR trier of fact] that the defendant's use or employment of the act or practice declared unlawful by [SECTION] was willful with the purpose of deceiving the public,

(b) A prevailing defendant upon a finding by the court that the action was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment.

Section 3. Limitation of Actions.

¹ This provision is needed only in states that opt to provide statutory damages, a minimum award to the plaintiff regardless of the actual injury. The model act does not provide for statutory damages, but fully compensates plaintiffs for any out-of-pocket loss.

² Legislation in states that do not currently permit class action lawsuits under their consumer protection statute should *not* include paragraph (e).

No action may be brought more than one (1) year after the person bringing the action discovers or reasonably should have discovered a loss resulting from an act or practice declared unlawful by [SECTION], but in no event may any action be brought under this chapter more than [four (4)] years from the first instance of the act or practice giving rise to the cause of action.

Section 4. Exemptions.

(a) Nothing in this Act shall apply to:

(1) Acts or practices required or permitted by or in accord with state or federal law, rule or regulation, judicial or administrative decision, or formal or informal agency action;

(2) Acts or practices by the publisher, owner, agent or employee of a newspaper, periodical, radio or television station or any other person without knowledge of the deceptive character of the advertisement in the publication or dissemination of an advertisement supplied by another; or

(3) Acts or practices by a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated the Act.

[(b) Nothing in this Act is intended to create a claim or remedy for a violation of a state or federal law, rule or regulation where the legislature did not establish a private right of action.]³

Originally passed by the Civil Justice Task Force in August of 2005 and passed by the ALEC Board of Directors in September of 2005.

³

This language is needed in states in which courts have permitted use of consumer protection statutes to effectively create private rights of action under other statutes or regulations where the legislature did not intend to allow private lawsuits.

EXPLANATION OF PROPOSED AMENDMENT TO ALEC MODEL ACT ON PRIVATE ENFORCEMENT OF CONSUMER PROTECTION STATUTES

Background

States have enacted consumer protection laws that broadly prohibit unfair and deceptive trade practices. Several states permit plaintiffs to seek treble (triple) damages.¹ ALEC's **Model Act on Private Enforcement of Consumer Protection Statutes** provides that where states have taken this path, treble damage awards should be reserved for cases in which there is clear and convincing evidence that a business willfully engaged in an unfair or deceptive trade practice with the purpose of deceiving the public.

The Issue

The model act, and some state consumer protection statutes, does not clearly define the amount of damages that may be trebled. Some plaintiffs' lawyers have asked that courts include amounts such as prejudgment interest or their attorneys' fees (which are often recoverable by prevailing plaintiffs under state consumer protection laws) as "actual damages" subject to trebling. Courts have reached inconsistent results in addressing this issue.²

This is an important issue because adding attorneys' fees or judgment interest to the amount awarded for actual harm may result in exponentially larger punitive damage awards that are not tied to the defendant's actions. In cases involving small amounts of damages, such as consumer claims, the plaintiff's attorney fees may substantially exceed his or her loss.

The Proposed Amendment

The proposed amendment clarifies that "actual damages" do not include judgment interest or attorneys' fees. It would add the following text to Section 1(c) {Private Right of Action}:

"Actual damages" means the out-of-pocket loss the person sustained as a result of the unlawful act or practice and does not include judgment interest, attorneys' fees, or civil penalties.

Explanation

Judgment interest, attorneys' fees, and civil penalties should not be considered "compensatory" damages.

- Attorneys' fees are not ordinarily recoverable in civil litigation. In some types of cases, legislatures have authorized recovery of litigation expenses for public policy reasons, not to serve compensatory goals. Including attorneys' fees in the amount of compensatory damages will arbitrarily result in higher punitive and treble damage awards in the types of cases in which recovery of legal fees are authorized and lower awards in other cases. As a result, defendants will be punished based on the type of claim the plaintiff asserts, rather than its conduct.
- The amount of judgment interest awarded is largely a function of the length and complexity of a lawsuit. Basing a punitive or treble damage award the amount of time that has passed since the injury or filing of a lawsuit punishes an individual or company for defending itself in court. In addition, the high judgment interest rates applicable in some states – which run as high as ten or even twelve percent³ -- already

include a punitive element. As a result, basing a punitive or treble damage award on judgment interest results in duplicative and excessive punishment.

- Neither attorneys' fees nor judgment interest are determined by the jury when it calculates the plaintiff's damages. Both amounts are determined by a court applying state law that has no tie to the defendant's conduct.

¹ Some state consumer laws authorize treble damages if the jury finds that the defendant acted intentionally, willfully, knowingly, with notice, or in bad faith. See, e.g., Colo. Rev. Stat. § 6-1-113(2)(a)(III); Ga. Code Ann. § 10-1-399(c); La. Rev. Stat. Ann. § 51:1409(A); Mass. Gen. Laws ch. 93A, § 9(3); N.H. Rev. Stat. Ann. § 358-A:10 N.M. Stat. Ann. § 57-12-10(B); Ohio Rev. Code Ann. § 1345.09(B); S.C. Code Ann. § 39-5-140(a); Tenn. Code Ann. § 47-18-109(a)(3); Va. Code Ann. § 59.1-204(A); Tex. Bus. & Com. Code Ann. § 17.50(b)(1). Other states award three times actual damages, and Wisconsin awards two times actual damages, to every prevailing plaintiff in a consumer protection lawsuit. See, e.g., Alaska Stat. § 45.50.531(A); D.C. Code Ann. § 28-3905(K); Haw. Rev. Stat. Ann. § 480-13; N.J. Stat. Ann. § 56:8-19; N.C. Gen. Stat. § 75-16; Wis. Stat. § 100.20(5).

² For example, some Texas appellate courts have trebled prejudgment interest as "actual damages," while others have not. See, e.g., *Paramore v. Nehring*, 792 S.W.2d 210, 211-12 (Tex. Ct. App. 1990) (permitting trebling of prejudgment interest and citing cases from other Texas appellate courts that have allowed trebling and several appellate courts that found prejudgment interest is not "actual damages" and should, therefore, not be trebled). The Texas Supreme Court has not resolved this split. See, e.g., *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 100 n.6 (Tex. 1994) (explicitly not reaching the issue of "whether the courts below erred in awarding trebled prejudgment interest").

³ See, e.g., Cal. Civ. Code §§ 3287 to 3291; Haw. Rev. Stat. § 478-2; Mass. Gen. Laws Ch. 231 §§ 6B, 6C; Minn. Stat. § 549.09(c)(2); Mont. Code Ann. § 25-9-205; N.M. Stat. § 56-8-4; R.I. Gen. Laws § 9-21-10; S.D. Codified Laws § 21-1-13.1; Tenn. Code Ann. §§ 47-14-121 to 123; Wis. Stat. §§ 807.01(4), 814.04(4), 815.05(8).



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Noneconomic Damage Awards Act

Summary

The Noneconomic Damage Awards Act provides that an award for noneconomic damages shall not exceed ~~[\$250,000⁺]~~a fixed amount adopted by the legislature or the amount awarded in economic damages, whichever amount is greater. Economic damages, such as medical expenses and lost income, are fully compensated and are not subject to the limitation.

Model Legislation

Section 1. {Title}

This Act shall be known and may be cited as the Noneconomic Damage Awards Act.

Section 2. {Definitions}

The following words, as used in this Act, shall have the meaning set forth below, unless the context clearly requires otherwise:

(A) "Noneconomic damages" means subjective, nonpecuniary damages arising from pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, loss of enjoyment of life, injury to reputation, humiliation, and other nonpecuniary damages.

(B) "Economic damages" means objectively verifiable pecuniary damages arising from medical expenses and medical care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses.

Section 3. {Damage awards}

In any personal injury action, the prevailing plaintiff may be awarded:

(A) Compensation for economic damages suffered by the injured plaintiff; and

⁺ To allow legislature to make a judgment as to what is appropriate for the state and that particular period of time."

(B) Compensation for the noneconomic damages suffered by the injured plaintiff not to exceed:

(1) [INSERT DOLLAR AMOUNT] \$250,000;² or

(2) The amount awarded in economic damages, whichever amount is greater.

Section 4. {Special damages findings required}

(A) If liability is found in a personal injury or wrongful death action, then the trier of fact, in addition to other appropriate findings, shall make separate findings for each claimant specifying the amount of:

(1) Any past damages; and

(2) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of damages:

(a) Medical and other costs of health care;

(b) Other economic loss; and

(c) Noneconomic loss.

(B) The calculation of all future medical care and other costs of health care and future noneconomic loss must reflect the costs and losses during the period of time the claimant will sustain those costs and losses. The calculation for other economic loss must be based on the losses during the period of time the claimant would have lived but for the injury upon which the claim is based.

Section 5. {Severability clause.}

Section 6. {Repealer clause.}

Section 7. {Effective date.}

Originally adopted by ALEC's Civil Justice Task Force at the Spring Task Force Summit April 13, 2002. Approved by full ALEC Board of Directors May, 2002.

² [State legislatures have adopted statutory limits on noneconomic damages ranging from \\$250,000 to \\$1 million. The ALEC Noneconomic Damage Awards Act recognizes that the appropriate amount is a matter of public policy for consideration of each individual state. Due to the importance of protecting affordable and accessible healthcare, a few states have adopted lower limits on noneconomic damages in medical liability case than applicable in other personal injury cases. Some states have adopted a two-tiered limit, permitting higher noneconomic damage awards in cases involving injuries that are defined as catastrophic in nature. For more information on state-by-state limits, contact ALEC's Civil Justice Task Force.](#)